No. 8097

In the United States Circuit Court of Appeals for the Ninth Circuit

LEE BOW SING and LEE BOW HOY,

Appellants.

vs.

MARIE A. PROCTOR, Commissioner of Immigration and Naturalization, Seattle, Washington,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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I

STATEMENT OF THE CASE

The appellants, Lee Bow Sing and Lee Bow Hoy, applied for admission to the United States at the Port of Seattle, Washington, and such admission was denied

by a Board of Special Inquiry, Bureau of Immigration, Department of Labor, an appeal was prosecuted by the appellants to the Board of Review, same department, and the appeal was dismissed. A petition for Writ of Habeas Corpus was filed in the United States District Court, Western District of Washington, Northern Division, and a show cause order issued thereon directing the said Marie A. Proctor, United States Commissioner of Immigration, Port of Seattle, to show cause why the said Lee Bow Sing and Lee Bow Hoy should not be admitted to the United States.

After argument by counsel and the submission of briefs, the court caused a minute entry to be made and entered an order and judgment denying the writ of habeas corpus. From the order and judgment so entered this appeal is prosecuted.

II

STATEMENT OF FACTS

The applicants, Lee Bow Sing and Lee Bow Hoy, sons of Lee Leng Tue, a native born United States citizen, arrived at the Port of Seattle, Washington, on the Steamship President Jefferson, June 25, 1935. They appeared before a Board of Special Inquiry of the Bureau of Immigration, Department of Labor, and on July 17, 1935, were denied admission to the United States. An appeal was taken from this finding to the Board of Review

on Appeals in said Department, and said appeal was dismissed on September 7, 1935. On September 20, 1935, the applicants were ordered deported, and on September 27, 1935, a petition for a Writ of Habeas Corpus was filed in the court below and a show cause order issued thereon, requiring the Commissioner of Immigration at Seattle to show why a Writ of Habeas Corpus should not issue.

III

Assignments of Error

The court erred in holding and deciding that a Writ of Habeas Corpus should be denied to the petitioners herein, denying them admission to the United States, as citizens thereof, sons of Lee Ling Tue, an American born Chinese.

IV

FINDINGS OF THE BOARDS

Admission to the United States was denied the applicants by the Board of Special Inquiry for the reason that the relationship claimed by them to their alleged father was not satisfactorily established by the testimony, evidence and records introduced in their behalf "nor has the claimed United States citizenship of Lee Leng Tue, your alleged father, ever been proved; also for the reason that you are aliens not in possession of an unexpired Immigration Visa and for the further reason that you

both are aliens ineligible to citizenship coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924."

The Board of Review on appeal over-ruled the above finding of the Board of Special Inquiry in that the citizenship of the father was conceded; otherwise the said Board of Appeal sustained the Board of Special Inquiry and dismissed the appeal, because "the claim of these applicants has no other support than the testimony of the alleged father who is discredited by his previous record statements, the serious age discrepancy in the case of the older applicant and the presence in the testimony of such discrepancies as that concerning the applicant's maternal alleged grandmother." (Finding of Board of Review, Page 4.)

V
QUESTION PRESENTED

Were the hearings before the Board of Special Inquiry unfair, and the findings of that Board and the Board of Review on Appeal arbitrary and unlawful?

VI
ARGUMENT

The hearings before the Board of Special Inquiry were unfair, and the findings of that Board and the Board of Review on Appeal were arbitrary and are unlawful,

because there is no legal evidence in the record to sustain them.

It is submitted that the denial of the appeal of these applicants from the findings denying them admission to the United States as the sons of a native born citizen under the circumstances is an abuse of discretion and an arbitrary act which this court should correct.

This statement is based on the fact that there is no legal evidence in this record which disproves the testimony of the two applicants which is conceded by the department "to be in entire agreement" (Board Record, p. 28) one with the other.

The Department carefully sets out that the father, Lee Leng Tue, is a discredited witness, and in the next breath cites his testimony in support of its findings, but refuses to accept it insofar as it sustains the fact that these applicants are his sons. If the testimony of the father is accepted as sustaining a point against them, in justice and fairness it should be accepted to sustain a point in their favor.

The Board of Review on Appeal after finding that the father "Lee Leng Tue is a discredited witness," devotes pages to his testimony and picks out one statement which it accepts as true possibly because in the mind of the Board it sustains its conclusion.

Let us examine, for a moment, the part record as made by the father. On July 20, 1924, the father stated upon arriving in the United States that he had one son, Lee Sing, the older of the two applicants, now before the court, who was then in his first year, and in the affidavit of November 15, 1928, the father stated that he had one son born in 1924. It cannot be seriously contended that these statements were made by the father of this boy with any ulterior motive. It is a straightforward statement of the fact which the Board of Special Inquiry endeavors to prove wrong by inference and unfounded conclusions.

We wish to point out to the court that these are not statements made in the recent so-called hearings before the Board of Special Inquiry after arrival of these two boys in America. They are not part of the testimony in the instant case, of the father, whom the Department has discredited, but they are statements made many years ago and are contained in affidavits which appear as exhibits in the record. These statements were made in good faith, and having been made so many years ago, they were made undoubtedly without thought of their future use in this connection.

If there is really any serious doubt as to this boy's paternity it will be immediately dispelled by an examination and comparison of the photographs of him and his father, which are attached to various exhibits in connec-

tion with this case. There are two of his pictures on the affidavit dated May 25, 1935. There are two on the affidavit dated February 20, 1935, in which the applicant has on the same necktie as is shown in the full length picture of him, which is also an exhibit in the record.

Then go back to the affidavit of May 9, 1898 (Dept. file 7030/7691) and even in that crude picture the resemblance is striking. From that come on down to the affidavit of April 6, 1922, and then to the affidavit of December 7, 1928, and examine the photograph of the father attached thereto and compare them with those of the boy. All of these affidavits and photographs are a part of this record, and the conclusion after examination of them is irresistable that the man in this picture and this boy, Lee Bow Sing, are father and son. The government admits that the father is a native of the United States, consequently the son must be admitted.

But the Government contended below that the pictures are not evidence of relationship. This is true to a limited extent. If we had just one picture of each of the parties and tried to base relationship upon them, we might not have a basis for such a claim, but here we have a series of pictures and the resemblance between these two individuals is striking in all of them. In such a situation it is submitted that the pictures are competent evidence, and while not perhaps conclusive, they are very persuasive.

The use of pictures for the establishment of relationship in cases of this kind is not new. They were accepted in the case of *Chin Quong Mew, etc. vs. Tillinghast, Commissioner of Immigration,* 30 F. (2) 684; they were used in the case of *Wong Som Yin vs. Nagle,* 37 F. (2) 893, in which this court said in part:

> "Resemblance between such Chinese and alleged father is competent evidence, but not conclusive as to whether Chinese is foreign born son of an American born citizen."

Why even the Government used pictures to establish its case before this court in *Ex Parte Shiginari Mayemura,* 53 Fed. (2d) 621.

The two applicants after having been admonished to tell the truth, testified through a sworn interpreter, and their statements concededly are in entire agreement. The older of the applicants testified as to the place and date of his birth and that the younger applicant was his brother. This was sufficient to sustain an order of admission if no other objection was made, under the ruling of this court in *U. S. vs. Wong Gong,* 70 Fed. (2) 107, in which the court said in part:

> "The testimony of this witness as to the date and place of his birth is, of course, hearsay, but it is competent. Wigmore on Evidence, S. 1501; U. S. vs. Todd, (C. C. A.) 296 F. 345. In the case at bar appellee testified before the District Court in trial de novo and the testimony given by appellee before the

> Commissioner and before the Immigration Inspectors as to where he had lived since his birth, was also introduced. The District Judge accepted this testimony, which, if believed, is sufficient to sustain the order."

It is submitted that a fair consideration of the facts demands that these appellants be admitted to the United States.

The age of Lee Bow Sing, the older of the two appellants, is attacked with much vigor by the Department. It is submitted that his age is established by his testimony and documentary evidence appearing as exhibits in this case. This evidence consists of an affidavit made by the father on November 15, 1928, that this boy was born in 1924. There is also an affidavit which is an exhibit in this record made by the father as far back as July 20, 1924, in which he swore that he had one son named Lee Bow Sing in his first year of age.

The Board of Special Inquiry had X-ray photographs made of Lee Bow Sing to establish his age. The Board record recites (p. 25) that on July 6th the Medical Examiner of Aliens expressed his opinion in writing in regard to the age of the applicant; the Chairman of the Board of Special Inquiry guessed the applicant was between fifteen and seventeen years of age, not less than fifteen. Another of the Board members guessed he was at least sixteen, and the other Board member guessed he is sixteen or seventeen. Then Dr. Seth, United States

Public Health Service, guessed he is "not less than fifteen and probably not more than seventeen or eighteen years."

The calculation of the age of human beings by observation or mathematical formula has not been developed to such a degree of accuracy that it is entirely reliable as in the case of horses. In this regard in speaking of the determining of the age of men and women by X-ray, Dr. Maurice M. Pomranz, Chief of the X-ray Department of New York Hospital for Joint Diseases, a leading authority on the question of physical stigmata, said in the case of Chin Ging Thing, File No. 55813/223:

> "Epiphyseal development is not a mathematical certainty, and the interpretation or determination of age from the roentgenograms has limited applicability. Medical service is not so exact that one can state unequivocally that an applicant's age corresponds to a mathematically found formula, particularly where authorities themselves differ within twenty to thirty per cent of the estimates given. If age determination is a scientific certainty then it must not be subject to variations or exceptions or else inaccuracies creep in. Either age determination is an accurate thing or it is not. If it is not, then no conclusions are warranted that utilize questionable scientific data as a yard stick by which to settle their problem. From the brief examination given it is safe to assume that physical development is a variable process: too variable to be reduced to a single mathematical formula. To attempt to determine a child's age within the limits of two or three years and use the X-ray as uncontrovertible evidence is as unjust as it is unwarranted from the facts given."

There is a letter in the record which reads as follows:

"DR. E. B. SCHROCK,

Seattle, Wash.

July 29, 1935.

Commissioner of Immigration, Seattle.

Dear Sir:

Examination of Lee Bow Sing, held at the Seattle Station, because of a question of his age, shows on X-ray examination, normal ossification for twelve years, with epiphyseal lines for that age well marked.

"Have had four different joints rayed and all indicate the same age.

"Will be glad to submit plates if you wish.

Respectfully yours,

(Signed) E. B. SCHROCK, M. D."

The Board of Special Inquiry did not mention this letter in its report to the Appeal Board. However, the Board of Review refers to it (p. 3), but it does not fit the finding which the Board had determined upon, so the letter was thrown out.

This illustrates the point made by Dr. Pomranz, supra. Here are two physicians estimating the age of the same individual from observations and X-ray photograph. One says he is not less than fifteen years of age, and the other says that the X-ray shows that he is about twelve years of age, and on this record we say that he is about twelve years of age, and our guess ought be as good

as any other layman's.

It is submitted that the only competent evidence in the record shows that he is of the age claimed. Dr. Seth, of the U. S. Public Health Service, appeared before the Board of Special Inquiry as above set out, and made the statement that in his opinion the boy was at least fifteen years of age, but the Doctor was not sworn as a witness. The age claim is supported by the statement of the applicant himself and by the statements of the father and the affidavits previously filed by him.

In the case of *Papa vs. Day,* 45 F. (2d) 435, the court said in part:

> "Medical evidence on exclusion of an alien should be by affidavit setting forth qualifications of the witnesses and reasons for the opinion, and not by medical certificate merely."

The testimony of the doctor in the instant case was based largely upon a letter which some other physician had prepared. It was not even a certificate.

The record of the hearings before the Board of Special Inquiry, together with the exhibits and the opinion of the Board of Review on Appeal is before the court. This record shows that the hearings started July 1, 1935, and the On Jeong Poy, interpreter, *was* sworn (p. 11). Chin Ham Ku replaced On Jeong Poy as interpreter and *was not sworn* (p. 8). On July 2, 1935, Jick Chan ap-

peared as interpreter and *was not* sworn. Lee Leng Tue, father of the applicants, appeared as a witness and *was* sworn, and Dr. R. E. Seth acting surgeon United States Public Health Service, appeared as a witness and *was not sworn* (p. 25). Why were some of these parties sworn and others not sworn. Here is an arbitrary exercise of power which *might* very readily adversely affect the rights of these applicants, and constitute the hearing unfair. Now what constitutes an unfair hearing. In the case of *U. S. ex rel Shun vs. Van De Mook,* 3 Fed. Sup. 101, the Circuit Court of Appeals said in part:

> "Hearing in deportation proceedings is 'unfair' when practice complained of *might* have led to denial of justice." (Italics ours.)

And in *Bilokumsky vs. Todd,* 263 U. S. 149, at page 157, the Supreme Court said:

> "To render a hearing unfair the defect, or practice complained of, must have been such as *might* have led to a denial of justice, or there must have been absent one of the elements claimed essential to due process." (Italics ours.)

The attention of the court is invited to the language of the Supreme Court in this case, and of the Circuit Court in the preceding case, to the effect that any practice which *might* lead to a denial of justice constitutes unfair hearing.

In this connection it is submitted that the practice of

hearing testimony of a witness through an unsworn interpreter *might* lead to a miscarriage of justice, and especially as is true in the instant case where it is *not shown* that the *interpreters* were *official interpreters,* or anyone connected with the Department holding the Investigation.

The discrepancies dwelt upon by the Board of Special Inquiry were to a large extent discounted and passed over by the Board of Review with the statement:

> "It is not deemed necessary to repeat the numerous other disagreements which have been detailed by the chairman of the Board of Special Inquiry, some of which might at least in the case of the younger of the two applicants be reasonably attributed to his immaturity." (Board record, p. 4.)

There were some, however, which were taken into consideration and which may be explained largely by the fact that the parties testifying were honestly mistaken as to dates.

In the case of *Ex Parte Ikeda,* 68 F. (2) 276, this court speaking through Judge Wilbur said in part:

> "Honest witnesses are apt to be mistaken in dates, and dishonest have very little to fear from deliberate falsehood as to dates because of that fact."

At page 4, last paragraph of the finding of the Board of Appeal on Review, the Board states:

> "The claim of these applicants has no other support than the testimony of the alleged father *who is*

> *discredited* by his previous record statements * * * and the presence in the testimony of such discrepancies as that concerning the applicant's paternal grandmother * * *." (Italics ours.)

What is the testimony concerning this grandmother? The two applicants say they have never seen her; the father, the discredited witness, says they have seen her; that they lived in the same house with her and attended her funeral after her death. The record (p. 16) shows that the grandmother "died CR 22-5-10 at 31 Dok Wo Nam Street, in my house; that date is by the new calendar (May 10, 1923)." May 10, 1923, is before either of the applicants were born but says the Board of Review, the Inspector or the stenographer made a mistake in transcribing the date in parenthesis. How do we know that the mistake was not made when the dates "CR 22-5-10" was recorded, but, says the Board, other statements of the father concerning this date show that "CR 22-5-10" is correct, but it is pointed out the father is a discredited witness.

In the case of *Wong Bing Pon vs. Carr,* 41 F (2) 604, this court held that because a child in a deportation proceeding is of Chinese birth cannot raise the presumption that he knows the names of deceased grandparents.

Furthermore, in regard to discrepancies in the record, the court speaking through Judge Rudkin, in the case of *Go Lun vs. Nagle,* 22 F. (2) 246, said in part:

"On examination of petitioner (applicant) * * * for entry as the son of a citizen, and of his father and older brother, each was asked a given number of questions, material and immaterial, as to dates, events, and description of places. On all questions relevant to the claim of citizenship the witnesses agreed, but there was some discrepancy in their recollection of minor and unimportant matters, and on that ground petitioner was excluded. Held, that the hearing was manifestly unfair and the finding against citizenship unwarranted by the evidence.

"The purpose of hearing on application for entry as citizen is to inquire into citizenship, and not to develop discrepancies which may support an order of exclusion."

See also

Nagle vs. Dong Ming, 26 F. (2) 438;
Hom Ching vs. Nagle, 41 F. (2) 126;
Louie Poy Hok vs. Nagle, 48 F. (2) 252.

The attention of this court is respectfully invited to the fact that the Board of Special Inquiry dwelt at great lengths on the proposition that the father of the applicant was not entitled to United States citizenship (Board Record, pages 27 and 28), and that the denial of admission to the appellants was based partially on that ground (Board Record, p. 26). It is submitted that with the Board in such a frame of mind a fair hearing could not be and was not given the appellants.

The decision of the Court below is based upon authority of

Mishimura Ekin vs. U. S. 142 U. S. 651;
In *Re Way Tai,* 96 Fed. 494;
Ex Parte Gouthro, 296 Fed. 506;
Lee Sun vs. U. S., 218 Fed. 432;
Jeung Bow vs. U. S., 228 Fed. 868;
Ng Mon Tong vs. Weedin, 43 F. (2) 178.

All of these cases except the last one, which deals with the competency of a doctor's certificate as evidence of age, involve either the Immigration Act of March 3, 1891, or that act as amended by the Act of August 18, 1894. Neither of these acts create or authorize the appointment of a Special Board of Inquiry. The Act of February 5, 1917, creates the Special Board of Inquiry and provides for the appointment of members thereof at various ports of entry.

Under the prior acts Inspectors, one or more, examined incoming aliens and it was not necessary that any record be kept of the proceeding. Under the last mentioned Act the Board of Special Inquiry is required to make a written record of all proceedings before it and forward it with its report. The result is that the testimony of witnesses is taken under oath in question and answer form as in a judicial proceeding.

In the case of *Ng Mon Tong vs. Weedin, supra,* (43 F. (2) 718), the witness, Dr. A. R. Bailey, made the certificate and examination. In the instant case no certifi-

cate was made and the individual who made the X-ray examination did not testify. The statement of Dr. Seth, who was *not* sworn as a witness, was based partially upon the statements of the X-ray examiner (Board record, p. 25). The failure of the Board of Special Inquiry to properly procure and receive this scientific evidence constitutes an unfair hearing under the opinion of this court in the case of *Wong Bing Pon vs. Carr,* 41 F. (2) 604, where the court holds that where a difference of opinion as to age of Chinese applicant for citizenship is sole substantial ground for rejection, failure of the Immigration officials to procure scientific assistance in effect constitutes an unfair hearing. The privileges of citizenship are not to be lightly denied an applicant for admission.

Conceding for the sake of argument, but specifically denying, that Lee Bow Sing is of the age of 15 to 17 years and therefore not the son of Lee Lung Tue, a native born United States citizen, how does that affect Lee Bow Hoy, the other applicant. We believe that on the record Lee Bow Hoy is entitled to admission because his birth date is established, his paternity is established, and his testimony is consistent and unimpeached. The discrepancies cited by the Board in its determined effort to exclude him because it thought his father had been improperly admitted 37 years ago, are of no consequence, being such as appear in the testimony of witnesses in any

trial or hearing.

It is submitted that even though Lee Bow Sing is denied admission, the hearing as to Lee Bow Hoy was unfair and the finding of the Board arbitrary and capricious, there being no evidence to support a decision excluding him.

> "The decision must be after a hearing in good faith, however summary, Chin You vs. U. S., 208 U. S. 12, *and it must find adequate support in the evidence.* Zakonaite vs. Wolf, 226 U. S. 272, 274." (Italics ours.)
>
> *Kwock Jan Fat vs. White,* 253 U. S. 454:
>
> "A finding without evidence is arbitrary and useless and an Act of Congress granting authority to *any* body to make a finding without evidence would be inconsistent with justice and the exercise of arbitrary power condemned by the Constitution. (Italics ours.)
>
> *Interstate Commerce Com. vs. L. & N. Railway Co.,* 227 U. S. 88.

We realize, of course, that a Board of Special Inquiry is not bound by the strict rules of evidence as are the courts, but such a Board is bound by rules of reason and logic. *Lee Wing You vs. Tillinghast,* 27 Fed. (2) 580.

VII

CONCLUSION

In conclusion, it is respectfully submitted that the Board record contains nothing which justifies the order of the lower court denying the writ of Habeas Corpus and

discharge of the appellants. On the other hand, the statements of the two applicants are unimpeached and are concededly in entire agreement; one corroborates the other.

Under the decision of this court above referred to, the evidence is sufficient to sustain an order for the relief prayed, but aside from these statements, there are in the record the statements made by the father in the years 1924 and 1928, together with the photographs of the father over a period beginning in the year 1898, and culminating in 1935.

Taken all in all, it is submitted that the record in this case indicates most clearly an unfair hearing and an arbitrary finding by the Board.

As a matter of fact, a close perusal of the record and the comments of the Board at the conclusion thereof will reveal that the real reason why these applicants were denied admission was because the Board of Special Inquiry felt that when their father was admitted to the United States as a native born citizen, it was on inadequate evidence. The Board of Appeal in the Department of Labor reversed the local board on this point, but we feel that because of this attitude of the local board that these applicants could not have a fair and impartial hearing before that body.

With reference to the discrepancies in the record, the court's attention is again most respectfully invited to the case of *Go Lun vs. Nagle*, 22 Fed. (2) 246 in which this court speaking through Judge Rudkin dealt with a case parallel to the instant case and goes into the matter of discrepancies very thoroughly.

It is further pointed out that most of the discrepancies referred to by the Board are those which might be expected in the testimony of youngsters of the ages of these applicants.

Remembering that these boys are but 12 and 6 years of age, and are inexperienced and were examined only by members of the Board, and only answered such questions as were asked, volunteering no statement, let us ask what judge or lawyer of any experience has not seen a witness examined by one side make an apparently impregnable case and then just one or two skillful questions by the opposite counsel and the case falls like a house of cards.

In cogitating this record, we believe that the ages of these applicants should be taken into consideration in determining their eligibility for admission. It cannot be expected that individuals of their ages would give the kind of testimony that would be given by an individual of mature years. It is further submitted that because of the ages of these applicants it is possible for an examiner of experience to put the answers in the mouth of the witness,

without the witness realizing it. This record shows on the part of these two boys a straight-forward story. They recite facts as they remember them, and in accord with the development of the power of observation of humans of their ages.

It is submitted that the hearings before the Board of Special Inquiry were unfair and unjust, and the denying of admission to these boys was an arbitrary act. That there is no legal evidence in this record upon which these applicants could legally be denied admission to the United States. That the evidence adduced does not support the findings of the Board of Special Inquiry. That the Findings of the Board of Special Inquiry and the Board of Review on appeal abuse the discretionary powers of these boards and that the order of the court below is unfounded and should be reversed.

In the alternative, it is suggested that should this court agree with the findings of said Boards and the lower court as to Lee Bow Sing, the older boy, it is submitted that the order of the lower court should be reversed as to Lee Bow Hoy, the younger boy, for the reason heretofore set forth.

It is therefore respectfully submitted,

1. That the order of the lower court denying the writ of habeas corpus should be reversed and the appel-

lants discharge ordered.

In the alternative,

2. That if the order of the lower court is affirmed as to Lee Bow Sing, the older boy, it should be reversed as to Lee Bow Hoy, the younger boy and his discharge ordered.

Respectfully submitted,

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